Supreme Court, U.S.
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No. 05- 051146 MAR 7 - 2006

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In The

Supreme Court of the United States

VINCENT DeMARTINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the motive requirement of 18 U.S.C. § 1959, which proscribes violent crimes committed "for the purpose of" maintaining or increasing position in an enterprise engaged in racketeering activity, should be given its ordinary meaning or whether, as the court of appeals has held, citing the legislative history of a different statute, 18 U.S.C. § 1961 *et seq.*, it should be "liberally construed to effectuate [the statute's] remedial purposes"?

2. Whether there was sufficient evidence that Petitioner violated 18 U.S.C. § 1959 by committing a violent crime "for the purpose of" maintaining or increasing position in a racketeering enterprise engaged in racketeering activity?

3. If the evidence, viewed in the light most favorable to the prosecution, at worst gave equal or nearly equal circumstantial support to the theory that the motive for the crime of violence was personal, not "for the purpose of maintaining or increasing position" in a racketeering enterprise, then must a reasonable jury necessarily entertain a reasonable doubt?

4. Whether, as one panel of the court of appeals has held, "if the evidence viewed in the light most favorable to the prosecution gives 'equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence,' then 'a reasonable jury must necessarily entertain a reasonable doubt' " or, as another panel of the same court has held, "when 'either of two results, a reasonable doubt or no reasonable doubt, is fairly possible[, a reviewing court] must let the jury decide the matter' "?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were as in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The United States Court of Appeals for the Second Circuit, in an unreported opinion reproduced in the appendix at App. 1, affirmed the judgment of the United States District Court for the Eastern District of New York, convicting Petitioner of conspiracy to commit murder in aid of racketeering, 18 U.S.C. § 1959(a)(5), assault with a dangerous weapon in aid of racketeering, 18 U.S.C. § 1959(a)(3), and using or carrying a firearm in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(A)(iii). There was no district court opinion.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2005, and a timely filed petition for rehearing was denied by that court on December 15, 2005. This petition for a writ of certiorari is being timely filed within ninety days of the denial of the petition for rehearing, in compliance with Rule 13.3 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

Title 18, United States Code, Section 1959, provides in pertinent part:

> (a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished –
>
> * * *
>
> (3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;
>
> * * *
>
> (5) for attempting or conspiring to commit murder or kidnapping, by imprisonment

for not more than ten years or a fine under this title, or both;

* * *

(b) As used in this section –

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

STATEMENT OF THE CASE

1. Petitioner and co-defendant Giovanni Floridia were charged in an indictment with conspiracy to commit murder in aid of racketeering, 18 U.S.C. § 1959(a)(5), assault with a dangerous weapon in aid of racketeering, 18 U.S.C. § 1959(a)(3), and using or carrying a firearm in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(A)(iii), all in connection with the July 16, 2001, shooting of Joseph Campanella on a Brooklyn, New York, street. Campanella sustained injuries to his foot and hand.

The indictment alleged that Petitioner was a soldier in the Colombo Family, and Floridia an associate. Campanella, who ultimately became a cooperating witness, testified that he too was a soldier in the Colombo Family and that Petitioner fired at him from the passenger seat of a minivan driven by Floridia. According to Campanella, there had been a rift between him and Petitioner over

Petitioner's claim that Campanella had an affair with Petitioner's wife.

Petitioner and Floridia were found guilty of all charges on May 6, 2004, following a two and a-half week jury trial.

2. At trial Campanella testified that during a Colombo Family "war" in the early 1990's he and Petitioner were in the "crew" of William Cutolo, a captain aligned with the faction loyal to "acting boss" Vic Orena against the faction loyal to incarcerated "boss" Carmine Persico. (T 601, 605)[1] In the late 1980's, when Petitioner had been incarcerated, Cutolo and Michael Spataro, a member of Cutolo's crew, would give Campanella money to give to Petitioner's wife. (T 603) Campanella would also pick up the Petitioner's daughter from school and bring her home. (T 603) In about 1993 or 1994, after the Colombo war had been settled, Cutolo told Campanella that he had received a complaint from Petitioner, who was again incarcerated, that Campanella had slept with Petitioner's wife.[2] (T 616; COA App. 38) Campanella denied this, and was "very, very angry after all I did for him and his family." Cutolo believed Campanella and said he would take care of it. (T 617; COA App. 39)

However, Cutolo later told Campanella that he had received a message from the son of Carmine Persico, "Allie

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[1] Numbers preceded by "T" refer to pages of the trial transcript, by "GX" to government trial exhibits, by "COA App." to pages of the appendix of appellant in the court of appeals, and by "App." to the appendix to this petition.

[2] Colombo Family rules forbid sleeping with another member's wife or children and forbid killing another member without permission from the family leadership. (T 570, 573)

Boy" Persico, to whom Cutolo now reported in the wake of the Colombo war, that Petitioner had sent a message to "Allie Boy" Persico stating that Campanella slept with Petitioner's wife. (T 617; COA App. 39) Cutolo was very upset that Petitioner had gone over his head, which was a big insult to Cutolo and to Campanella. (T 617; COA App. 39) After Petitioner was released from jail, he and Campanella never spoke about the allegation, and Cutolo told Campanella to "let it go." (T 617; COA App. 39) From 1995 to 2001, Campanella spoke to Petitioner only two or three times. (T 621)

In the aftermath of the Colombo Family war, "Allie Boy" Persico became acting boss of the Colombo Family, Cutolo acting "underboss" and "Joe Waverly" consigliere, and Jackie DeRoss ultimately became Campanella's and Petitioner's captain. (T 618, 625)

In January 2001 DeRoss was indicted and placed on house arrest. (T 646, 1261-63) The codefendants in DeRoss' indictment included Campanella's brother, Frank. (T 1318) In April 2001, the Government provided as discovery to DeRoss, Frank Campanella and the other defendants in that indictment a previously undisclosed audiotape of a March 28, 2000, consensually recorded conversation between DeRoss and Cutolo's son, William Cutolo, Jr. ("Cutolo Jr."), a Colombo Family associate. (T 625, 1258-59, 1317-18; GX 24, 25 [COA App. 53-60])

Cutolo Jr. had begun cooperating with the Government the day after his father disappeared on May 19, 1999, and Cutolo Jr. taped conversations and provided documents and other items to the FBI. (T 1251-52, 1276) In a March 28, 2000, taped conversation an irate DeRoss calls Campanella a liar, complains that Campanella owes

the family money while driving around in a new car, and talks of taking action against him. (GX 24, 25 [COA App. 53-60])

Some 16 months later, on July 16, 2001, Campanella was shot at approximately 2:30 p.m. Telephone records introduced at trial showed numerous calls on June 15, 2001, and July 16, 2001, between a phone associated with Petitioner and phones or pagers associated with persons allegedly tied to Colombo Family, Spataro, John Cerbone, Carmine DeRoss and Floridia. (GX 44, 45; T 1344-45) Records for the morning of July 16, 2001, showed calls between phones associated with Petitioner and ones associated with Floridia. (GX 46; T 1347-49) Between 2:30 p.m., when Campanella was shot, and 3:10 p.m. there were ten calls from a cell phone associated with Petitioner: five to Spataro's cell phone (2:31, 2:36, 2:39, 2:46, 2:50), two to Floridia's parents' phone (2:40, 3:08), one to Floridia's home phone (3:10), and two to Carmine DeRoss's pager (2:42, 2:45). (GX 46; T 1357-58)

3. On appeal from Petitioner's conviction, the court of appeals rejected his claim of insufficient evidence that the shooting was "for the purpose of" maintaining or increasing position in a racketeering enterprise. The court held that there was evidence of "position-related motivation," because the Government "introduced evidence that the killing could not have been performed without authorization from family leadership, testimony that Jackie DeRoss, a senior member of the organization and Petitioner's direct superior, was angry at the victim, and evidence that *Petitioner was in communication with this superior* around the time of the shooting." (App. 2; emphasis added.)

In fact, the court of appeals was indisputably mistaken, because there was no evidence that Petitioner was in communication with Jackie DeRoss around the time of the shooting. There was evidence that Petitioner was in communication with *Carmine* DeRoss – a nephew of Jackie DeRoss and at most a Colombo Family associate – but not Jackie DeRoss or any other "superior." (*See* Appendix to Government's court of appeals brief at G. App. 6-7; T 646-49.) The court of appeals declined to rectify this error when Petitioner called it to the court's attention on petition for rehearing.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Liberal Construction of The Motivation Requirement of 18 U.S.C. § 1959 Expands The Scope of The Statute to Conduct, Like Petitioner's, Which It Does Not Proscribe.

1. Although there was evidence that Petitioner shot the victim, Campanella, evidence that Petitioner and Campanella were members of the Colombo Organized Crime Family, and even evidence that other persons associated with the Colombo Family may have assisted Petitioner, there was no evidence establishing that Petitioner's motive was anything other than, in the prosecutor's own words in summation, "hat[ing] Campanella . . . because he believed that Campanella had had an affair with his wife."[3] Therefore, there was insufficient evidence

[3] In closing argument, the prosecutor described Petitioner's motive for shooting Campanella as follows:

> You know that *Petitioner hated Campanella and had all the motive in the world to be the shooter because he believed that*

(Continued on following page)

that Petitioner violated 18 U.S.C. § 1959, the text of which proscribes only those violent crimes committed "*for the purpose of* gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." (Emphasis added.)

The court of appeals, however, has construed the motive requirement of the statute "liberally." In *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992), the court, referencing the legislative history of § 1959, noted that the statutory phrase "for the purpose of . . . maintaining or increasing his position in" the enterprise was included as a means of proscribing violent crimes committed "as an integral aspect of membership" in such enterprise. *Id.* at 381, *citing* S. Rep. No. 225, 98th Cong. 1st Sess. 304-07, 304 (1983) ("S. Rep. No. 225"), *reprinted in*

Campanella had had an affair with his wife while Petitioner was in prison. He had already brought that issue to the attention of Billy Cutolo, and when Billy Cutolo told him to forget it, he took the complaint to Allie Boy Persico. He went over Cutolo's head, he felt that strongly about it, but he was not allowed to do anything about it at that time. As Campanella told you, no one can kill a made member of a Mafia family without permission from above. If Petitioner did not have permission, he and his associates would themselves be marked for death for violating this most basic rule. But now Petitioner has permission because *now DeRoss has a motive himself.* Now DeRoss can also see the wisdom in eliminating Campanella. It's too risky to keep him around. He knows too much. He is too unhappy with his captain and there is too much heat on him from law enforcement. Campanella must die. (T 1510; COA App. 44; emphasis added.)

The Government's opening statement was of similar tenor, declaring that "You will hear that Petitioner hated Campanella for years"; because Petitioner claimed that Campanella had an affair with his wife, they "barely spoke for years, in fact the rift never ended"; and "Petitioner was awaiting the green light to kill Campanella and in July 2001 he got it." (T 509, 517, 519; COA App. 27, 35, 37)

1984 U.S. Code Cong. & Admin. News ("USSCAN") at 3483. The court, noting that "Congress intended RICO, which § 1959 complements, to be 'liberally construed to effectuate its remedial purposes,'" *id.*, *citing* Pub. L. 91-452, § 904(a), 84 Stat. 947, concluded that the motive requirement is satisfied "if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *Id.*

Concepcion continues to be the controlling construction of § 1959's motivation requirement in the court of appeals. *See, e.g., United States v. Pimentel*, 346 F.3d 285, 296 (2d Cir. 2003); *United States v. Dhinsa*, 243 F.3d 635, 671 (2d Cir. 2001). In addition, at least four other circuits follow *Concepcion*. *See United States v. Tse*, 135 F.3d 200, 206 (1st Cir. 1998); *United States v. Fiel*, 35 F.3d 997, 1004 (4th Cir. 1994); *United States v. Fernandez*, 388 F.3d 1199, 1233 (9th Cir. 2004); *United States v. Smith*, 413 F.3d 1253, 1277-78 (10th Cir. 2005).

2. However, in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), subsequent to the *Concepcion* decision, this Court reined in the clause, "liberally construed to effectuate its remedial purposes," the clause which the *Concepcion* court borrowed from the legislative history of the RICO statute, 18 U.S.C. § 1961 *et seq.*, to justify its liberal construction of § 1959. The *Reves* Court stated:

> This clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress

> had in mind. Those must be gleaned from the statute through the normal means of interpretation. The clause "'only serves as an aid for resolving an ambiguity; it is not to be used to beget one.'"

Id. at 183-84 (citation omitted). Thus, contrary to the court of appeals' expansive view, the statutory phrase "for the purpose of . . . maintaining or increasing his position in" a racketeering enterprise should not be interpreted liberally, but according to the plain and unambiguous meaning of its terms, by focusing on the individual defendant's actual "purpose" in committing the violent crime at issue.

3. Here, the court of appeals' conclusion that there was sufficient evidence of "position-related motivation" did not focus on Petitioner's own "purpose." Rather, the court focused on "evidence that the killing [*sic*] could not have been performed *without authorization* from family leadership." (App. 2) Taken as true, this is evidence only that Petitioner was *permitted* to shoot the victim, not evidence of his purpose. Likewise, evidence that "Jackie DeRoss, a senior member of the organization and Petitioner's direct superior, was angry at the victim" (App. 3) – albeit 16 months prior to the shooting – is no evidence of *Petitioner*'s motive. Finally, the asserted evidence relied upon by the court of appeals "that Petitioner was in communication with this superior around the time of the shooting" (App. 3), besides being a demonstrably mistaken reading of the trial record (*see*, page 7, *supra*), is also no evidence of Petitioner's own purpose.

Thus, the court of appeals' conclusion that the evidence was sufficient can only be explained by the court's liberal interpretation of the statute. Formulations like the violent crime was committed "as an integral aspect of

membership" in the enterprise, *Concepcion*, 983 F.2d at 381, or that the defendant "knew it was expected of him by reason of his membership in the enterprise," *id.*, do not focus properly on the defendant's own motive or purpose, as the statute requires.

Certiorari should be granted to ensure correct and uniform application of 18 U.S.C. § 1959.

II. The Court Of Appeals' Conflicting Standards for Determining Whether Circumstantial Evidence of Guilt Is Legally Sufficient Foster Arbitrary Decision-Making in Violation of The Right to Due Process, All The More So under That Court's Liberal Construction of The Motivation Requirement of 18 U.S.C. § 1959.

In *United States v. Glenn*, 312 F.3d 58 (2d Cir. 2002), the court of appeals held that "if the evidence viewed in the light most favorable to the prosecution gives 'equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence,' then 'a reasonable jury must necessarily entertain a reasonable doubt.'" *Id.* at 70 (citations omitted). But in *United States v. MacPherson*, 424 F.3d 183 (2d Cir. 2005), the same court took nearly the contrary position: "when 'either of two results, a reasonable doubt or no reasonable doubt, is fairly possible[, a reviewing court] must let the jury decide the matter.'" *Id.* at 190 (citations omitted).

Inevitably, the author of *Glenn* and the author of *MacPherson* later sat on the same panel and espoused these conflicting views, with the *MacPherson* view a dissenting one in that particular case. *Compare United States v. Cassese*, 428 F.3d 92, 99 (2d Cir. 2005) (*citing Glenn*), *with id.* at 104 (dissent) (citing *MacPherson*).

The standard employed to decide Petitioner's appeal is not stated in the summary opinion, but the decision may well have turned on which standard was applied, since the evidence here, viewed in the light most favorable to the prosecution, at worst gave equal or nearly equal circumstantial support to the theory that the motive for the crime of violence was personal, not "for the purpose of maintaining or increasing position" in a racketeering enterprise. Thus, Petitioner's appeal was subject to arbitrary decision-making, depending on which of two contrary standards was applied.

Certiorari should be granted to endorse the logical principle of law that a reasonable jury must necessarily entertain a reasonable doubt when the evidence gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
March 7, 2006

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 2nd day of November, two thousand and five.

Present:

HON. SONIA SOTOMAYOR,
HON. RICHARD C. WESLEY,
Circuit Judges,
HON. CHARLES L. BRIEANT,
District Judge.*

- x

UNITED STATES OF AMERICA,

Appellee,

-v.-

No. 05-0977-cr

VINCENT DeMARTINO, also known as "Chickie,"

(Filed NOV. 2, 2005)

Defendant-Appellant.

- x

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* The Honorable Charles L. Brieant, United States District Judge for the Southern District of New York, sitting by designation.

APPEARING FOR APPELLANT:

DIARMUID WHITE, White & White (Brendan White, *on the brief*), New York, New York.

APPEARING FOR APPELLEE:

THOMAS J. SEIGEL, Assistant United States Attorney, Eastern District of New York (Roslynn R. Mauskopf, United States Attorney, *on the brief*, David C. James, Assistant United States Attorney, *of counsel*), Brooklyn, New York.

UPON DUE CONSIDERATION it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the United States District Court for the Eastern District of New York (Dearie, J.) is AFFIRMED.

Vincent DeMartino appeals from his conviction for assault and conspiracy in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(3) and (5). DeMartino argues that the evidence at trial was insufficient to show that he committed these crimes "for the purpose of gaining entrance to or maintaining or increasing [his] position in" a racketeering enterprise, as required by § 1959(a). We assume the parties' familiarity with the facts in the case, its relevant procedural history, and the issue on appeal.

DeMartino claims that he was motivated by his desire for revenge against the victim, who he believed to have had an affair with DeMartino's wife. But the government also introduced evidence that the killing could not have been performed without authorization from family leadership, testimony that Jackie DeRoss, a senior member of

the organization and DeMartino's direct superior, was angry at the victim, and evidence that DeMartino was in communication with this superior around the time of the shooting. From this the jury could reasonably have inferred that DeMartino had both a "position-related motivation" and a nonposition-related motivation for the shooting. *See United States v. Pimentel*, 346 F.3d 285, 295-96 (2d Cir. 2003) (noting that to prove "position-related motive" under § 1959, the government need not prove that maintaining or increasing a defendant's position in a RICO enterprise was the defendant's sole or principal motive.)

For the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk

/s/ Olivia M. George

By: Olivia M. George,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	12/13/05
Docket Number:	05-0977-cr
Short Title:	USA v. DeMartino
DC Docket Number:	03-cr-285
DC:	EDNY (BROOKLYN)
DC Judge:	Honorable Raymond Dearie

(Filed Dec. 15, 2005)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 15th day of DEC. two thousand five.

05-0977-cr, USA v. DeMartino

Present:

Hon. Sonia Sotomayor,

Hon. Richard C. Wesley,

CIRCUIT JUDGES,

Hon. Charles L. Brieant,

DISTRICT JUDGE.

A petition for panel rehearing having been filed herein by Appellant Vincent DeMartino.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

For The Court,
Roseann B. MacKechnie, Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney